On the nature of the right to resist: a rights-based theory of the ius resistendi in liberal democracies

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CHAPTER II: IDEOLOGY, LAW, AND THE RIGHT TO RESIST

The right to resist has been traditionally considered as an engagement that speaks directly to the "higher law", to the source of all that is legitimate, whether the law of God, the law of nature, or the law of reason. Man has long ached to identify the external origin of all that is good and rightful, the source of the legitimate power, so that he can avoid having to decide himself and compromise his own, human, dubious nature. In that quest for the source of all legitimacy, modern man has crafted the notion of the ideology as the space where power, believe and reason converge.

In the space of the ideology, power and resistance are not opposed but rather interconnected[69]. They shape and reinforce each other. It is through the exercise of authority that power, embodied in the law, becomes an expression of the ideology. It is through the appeal to that the ideology that one opposes deviant power, particularly in the form of challenging the legitimacy of the law that represents the manifestation of that power. And it is through the examination of the role of ideology as the *grundnorm,* that one arrives at the conclusion of the inseparability of law and politics as expressions of power. I analyse law and the right to resist in relation to the structure and the value of what I term "the ideology", not as a notion purely of the political or referring to competing "isms" (Czolacz 2022), but in the meaning coined during the aftermath of the French Revolution to describe a science consisting of the study of the origin and nature of ideas, a term that refers to the worldview acquired through experience, reason and believe.

[69] Forms of rule and the changes they undergo can, in fact, be reconstructed in terms of the resistance they provoke (Daase and Deitelhoff 2019)P12).

2.1. The ideology.

For any practical proposition, what I call the ideology[70] can also be referred to as the *grundnorm*[71], the constituent power[72], the *volksgeist*, the metaconstitution[73] or the consciousness, depending on the field of knowledge. The ideology is the basic system of values and ideas from which all laws, rules, and norms, including constitutions, acquire their formal and political legitimacy, the "self-evident" truths that the American Founding Fathers spoke of[74]. The ideology is the higher law, not one law, one rule, or one norm, but rather, the normative tenet (normative in the sense of "ought") that embodies the ideals and aspirations of rightness and justice. The ideology is the result of the clash and the evolution of narratives, the result of wars and the becoming of ideas, is what provides cultures with its symbology and what defines power relations, and with it, the idea of society. The ideology is the whole that determines the truth (Marcuse 1965)P83). The ideology is the system of moral values that forms the basis of political theory (Erman and Möller 2013), of our understanding of how a society should be organized, of what forces come to play in that organization, and how we actually realize that vision. When we doubt the ideology, we also doubt the legitimacy of the laws, the norms, and the rules that derive from its values.

The ideology conditions every relation in society, it defines the channels for political exchange, and draws the space where rights are formed and contested. There is no escaping the influence of the ideology because there is no living outside of the ideas that makes us rational political beings, there is no living outside of the *demos*, although we can challenge and resist it. When we take the ideology for granted, when it is assumed in a way we do

[70] I use the term ideology in the meaning that Antoine Destutt de Tracy coined it in 1796 as the "science of ideas", a system developed from the ideas that people form in their minds due to the sensations they experience as the interact with the material world (E. Kennedy 1979)P355). This is a crucial as ideology is not beyond the epistemic, it is a view formed by experience and not by blind dogmatic believe. Experience (or practice) modifies the ideology as it challenges the coherence of the system of ideas that it attempts to provide.

[71] Although for Kelsen the *grundnorm* can only be presupposed (Loughlin 2017)P12), I use the term in its meaning as the tangible (not presupposed), founding norm. The ideological *grundnorm* informs the whole order with meaning and direction because of its intrinsic moral-performative value. Clearly a non-positivist position. It is the reason we think and act the way we do.

[72] Carl Schmitt defined the *pouvoir constituant* as playing the theological role of the objectively unclear God, acting as the extra-legal power which justifies the legal power of the sovereign (Liew 2012)P2). Schmitt uses an alternative, secular way of defining ideology which, in his case, was also used to justify the "unity" of the nation and the ultimate power of the "sovereign", with horrible and reprehensible outcomes. Such is the power of ideology and of the terms we use to refer to it.

[73] Larry Alexandre differentiates between constitution, which is the set of agreed-upon symbols, and the metaconstitution, which is the agreed-upon mode of identifying and interpreting those symbols (M. P. Golding and Edmundson 2005)P9).

[74] Costas Douzinas argues that when the American revolutionaries declared at the beginning of the Declaration of Independence 'We, the People', they made a double claim: 'who' we are (the constituent part) and 'what' we will become (the constituted) (Douzinas 2021).

not even realize, is when the ideology exists at its purest (Canaan, Hill, and Maisuria 2013)P182). It is at that moment, when we internalize it, that some consider that ideologies become forms of consciousness that make people, contrary to their own interests[75], contribute to the reproduction of oppressive power relationships (Prinz 2018), or that adopt forms that conceal structural injustices making its harms look necessary or justified (Delmas 2018)P14).

Ideologies are man-made, they are thought experiments[76], rational choices from those that have the power to shape and change the will of others through power, believe or reason. Historically, only a few have had that power, which means that the *demos* has always been under the continuous threat of monopolizing tendencies of those with the skills, resources and time to impose their will on society (Elbasani 2009)P414). Some argue that the persuasive power of legitimating ideologies is often circumscribed to limited circles of ruling and elite strata, and ineffectual among the masse (Abercrombie and Turner 1978). Nothing further to the truth. The elites, the ruling class, the aristocracy, the oligarchy or the capitalists, depending on the time, have had the means to generate (or rather impose) acceptance of their ideas on the rest of society, and they continue to do so. Karl Marx argued that the ruling ideas in society are, indeed, the ideas of the ruling class (Clement 2016)P137), and in one way or another, I believe, we generally accept an informal Marxist account of law and society, one in which one can explain legal (and political) outcomes most of the time by referring to the interests of the ruling class (Tushnet 1991)P1528)[77].

Although one can never escape the ideology, there are, certainly, ways in which it can be transformed. Ideologies, like morals, principles and ideas, are not static, for no social system is safe from change (Winter 2017)P75). Ideologies can undergo subtle alterations in the course of normal social dynamics, or more poignant ones through external acts of resistance that accelerate change. These changes can alter the normative framework of the ideology and even its principles, but not its fundamental values, for new values entail a new ideology[78]. What differentiates resistance from revolution, the right to resist from the right

[75] In the sense of the Marxist understanding of ideology as the "false-consciousness" which prevents the proletariat from realizing the material reality of their exploitation by the bourgeoisie (Czolacz 2022).
[76] For Hegel, man "produces" himself through thought. One may argue, Hannah Arendt noted, that all notions of man-creating-himself have in common a rebellion against the human condition itself (Arendt 1969)P4).
[77] On 6 September 2022, Liz Truss became Prime Minster of the UK after winning 81,326 votes of conservative-party members. "Tories tend to be older, more middle class and more white than the rest of the population" https://www.bbc.com/news/uk-politics-62138041
[78] The Treaty of Lisbon established that the EU is a community of values, and the legal order that is established in the acquis, is a representation of that common understanding of the critical importance of respecting and protecting the fundamental values in which the Union is formed. The concept of the essence of a fundamental right—set out in Article 52(1) of the Charter of Fundamental Rights of the European Union—

to revolution, is precisely their truthfulness to the principles of the ideology. The strength of an ideology rests therefore not in whether it is just or unjust (a concept in itself defined by the ideology), but in whether it can endure and adapt its normative framework to respond to poignant social challenges.

For some, the structure of ideologies can be explained through three elements; a) their epistemic nature, which is directly responsible for the forms of consciousness or ideas created; b) their genetic reasons, which are related to the way people come to these forms of consciousness, and c) their functional roles that contribute to the reproduction of social forms of rule (Prinz 2018). This interpretation of the concept of ideology bears similarity with that of Foucault's regime of truth as they both become intertwined with the practice of power and the political notion of the regime. For Foucault, each society has its regime of truth[79], like each society is determined by its ideology. By regimes of truth Foucault means: 1) "the types of discourse that society harbours and causes to function as true", that is, the epistemic nature of the regimes of truth, 2) "the mechanisms and instances which enable one to distinguish true from false statements", the genetic reasons that people come to see those truths, and 3), "the way in which each is sanctioned", in other words, the functional roles that contribute to reproducing those truths (Lorenzini 2015)P2). I have chosen the concept of "ideology" over "regime of truth" because, unlike Foucault, I do not assume the meaning or the relevance of truth in the regime. Rather, my concept of ideology presupposes that there is a bias inherent to that human creation – because ideology is the convergence of power, reason, and believe – and that all normative conditions in the ideology are moulded to transform that bias into truth.

The same structure can be applied to understanding the nature of law as part of the system of the ideology. Law derives from, and simultaneously supports the ideology and its values. It forms a system, a "rule of law"[80] that is legitimized by the very order that is held together by the law. I examine the concept of law through the lens of the structure of ideologies, that is, by analysing a) law´s epistemic nature, which refers to the origin and sources of law, b)

operates as a constant reminder that the core values as Europeans are absolute and, as such, are not up for balancing" (Lenaerts 2019)P782). The EU is a community of values, and its strength resides on a common legal framework that actualizes those values across borders. In response to the ruling of the Polish Constitutional Court declaring the primacy of Polish Law over EU Law, on 19 October 2021, during a debate with the Prime Minister of Poland Mateusz Morawiecki in the European Parliament, Ursula von der Leyen, President of the Commission was emphatic in noting that "we cannot, and we will not allow our common values to be put at risk, the Commission will act, and the options are all known" (El Pais, 19 October 2021).

[79] Foucault makes it clear that these rules are not themselves autonomous: on the contrary, they are always the result of a historical, social, cultural and ultimately a political' production (Lorenzini 2015)P5).

[80] For the purpose of the thesis, I adopt Brian Tamahana´s notion that "the rule of law is not in itself a legal rule or a rule system, but a political and cultural ideal that emerges over time and provides essential support for the proper functioning of law" (Tamanaha 2017)P31).

the genetic reasons that make people determine the validity of the form in which law is enacted and implemented, and c) the functional nature that determines the degree to which law assists in reproducing social forms of rule, including whether people are obliged to obey it. Without understanding the role of law in the ideology, it is impossible to comprehend the nature and the role of *ius resistendi* within a specific context.

The endurance of an ideology can therefore be measured by testing whether the transformations of the principles of the ideology and those of the legal system reflect or support each other, and whether the order has effective systems in place to resolve the potential conflict between its epistemic, its functional and its genetic roles (that is, between the foundational values, their legitimacy, and their compliance). The grater arrogance of power, Douzinas writes, is to believe it can change society radically by legislating a few policies, while destroying the values that enable their acceptance and application (Douzinas 2013)P55). The legitimacy in the assertion of the right to resist is acquired in the same manner that laws and policies obtain (or lose) theirs, through a test of compatibility with the principles of the ideology.

2.2. The epistemic nature; law and power.

The ideology is materialized through power. The actualization of power, and the resistances to offset it, lie at the origins of conflict, and therefore, of politics. The shape that the political takes is contingent on the conditions created to justify and maintain the imposition of one conflicting notion of power over the others, justifications that are largely based on religious[81], aristocratic, property ownership[82], and social traditions (Tamanaha 2017)P6). In the pursuit of its own substantiation and legitimization, each ideology has tried to balance divergent and opposing views about the conditions to maintain power in one way or another, establishing a range of mechanisms to confront, manage or contain that conflict[83]. Western societies have increasingly relied on the institution of law[84].

[81] For Axel Honneth, traditional societies are said to have been "integrated" around rigid norms and values corresponding to social aims anchored in and justified by religious and metaphysical belief systems (Dearnty 2011)P61).

[82] For some, the whole idea of law derives from the articulation of the right to property (Tamanaha 2017) (Douzinas 2013).

[83] Communitarianism holds that there is no one set balance point that can be found in all societies. Rather, the particular balance between rights and responsibilities or rights and the common good will vary with the cultural and historical context, across societies and over time (Etzioni 2014)P246).

[84] For Habermas, the principle of democracy is supposed to rationally reconstruct the democratic procedure for the production of law, which is the sole source of legitimacy in modern Western societies (Finlayson 2016)P6).

History shows that law is in a special way linked to the history of political ideas (Schmoeckel 2002)P7), for law is a product of power and, at the same time, its sustenance[85]. Natural law theories leaned on divine law to explain the world, the divine also being a human-made construct with a clear purpose of social control[86]. Positivists rely on the sources of law to determine their legality. The sources of law also being a man-made social construct. For others, law is continuous with, and fundamentally dependent upon, informal social practices (Postema 1994)P362). Critical legal scholars see law as a form of human activity in which political conflicts are worked out in ways that contribute to the stability of the social order, in part by constituting personality and social institutions in ways that come to seem natural (Tushnet 1991)P1526). For realists, what people consider law will be law as far as people, as lawmakers, "conventionally attach the label law to" (Tamanaha 2017)P194). Communitarians consider that law must be understood not as an independent organism, but as an integral part of the social system (Shapiro 1964)P295), and Foucault argued that there are different kinds of law on the basis of the objectives that law serves and the regime of truth that it embodies (Brännström 2014)P175). There are as many interpretations of law as there are human conceptions of power.

Dworkin argued that law is an argumentative social practice whose function, complexity, and consequence, depend on participants making and debating claims about what the law requires (Loughlin and Tschorne 2017)P9). He contended that officials and citizens have a duty to integrate the legal principles found in the law into a coherent whole that presents the entire system of laws in the best possible moral light. This integrative process is a matter of construction of an evolving notion, the law, that depends on the social debate and the fundamental principles of that society (Bellamy 2015)P6), and therefore it cannot be determined without taking a position on the values and principles it exists to serve (Loughlin and Tschorne 2017)P10). We would not argue, Dworkin noted, for the validity of a legal principle in the same way as we would for a legal rule, rather we would point to a principle's "sense of appropriateness" and the extent to which it was supported by the moral concerns and traditions of the community (Ramsay 1978)P551). In the matter of principles, questioning and defiance constitute important means of testing the validity of laws (Alton 1992)P66). Rather than expanding the notion of rights to the moral, the Dworkinian principle of appropriateness, I contend, reinforces the conception that law is a tool operated those that dominate the means of enacting and implementing it, in other words, by those with the capacity to impose their ideas in the argumentative social practice, by those that win the arguments. One could even wonder if perhaps the difference between resistance

[85] Some claim that "law is so readily identified with the exercise of power that it is easy to overlook the sense in which law functions as a technique for generating and culturing social resistance" (Pottage 2013)P262).
[86] Natural law is not per se "good law". Walter Benjamin argued that a dictatorship´s goal is to replace the unpredictability of historical accident with the iron constitution of the laws of nature (Mcquillan 2010)P100).

and revolution is not so much whether one or the other change the values of the ideology but, rather, about the morality of the power used to win the moral arguments about the moral validity of the principles that sustain the order. In other words, what kind of force, coercion, debate, accommodation, or violence is used by power to "win" the moral argument about the appropriateness of the law.

Regardless of the conception of law that one ascribes to, because the modern form that law takes is as an expression of political power[87], there is no avoiding the functional relationship, or the interaction between the two (Priel 2013)P324) (Loughlin 2014)P971) (Weinrib 2014). Law cannot rationalize itself only on being law. Law is politics by other means[88], even though it comes with specific requirements and in a specific form (Michaels 2018). And it is oftentimes the restrictive and limiting nature of these requirements and forms that is challenged by the right to resist, a challenge that can transform the relations of power and present itself as having a "right to law" (Douzinas 2014b)P165), that is, a right to legislating one´s own circumstances[89]. In other words, the right to power is the right to law.

Law then inevitably becomes self-protective of those that control legal institutions and of powerful groups within society that are able to produce laws that serve their interests (Tamanaha 2017)P5) (Tushnet 1991)P1517) (Wolin 2008)P159). This protection, by its very nature, implies that others are excluded. For Foucault, law engages responsively with exteriority made up of resistances and transgressions, and therefore is constantly responsive to new forms and content (Piška 2011)P254). Specific expressions of resistance emerge as a consequence of acts of force between those that want to preserve their space of privilege, and those that challenge it, in a never-ending circle of dichotomies and opposing conceptions of power that maintains life in the *polis*. The affirmation of power through force, understanding force as the capacity to impose or to impede a change of the normative situation of another person or of a group of persons, responds to the competition over the nature of those requirements and forms. Yet while politics and law play a distinctive and complementary role in the ideological order, and in its preservation, one must always remember that it is power that defines the order. As Hannah Arendt noted, "in a conflict between law and power, it is seldom the law which will emerge as victor" (Arendt 1990)P151). Power is "an end in itself" (Arendt 1969)P11), law is only one of the means to

[87] I understand political power as the capacity to engage in certain acts, and in certain spheres, that are not allowed or available to private citizens, in other words, the degree of maneuver of influence in the ius politicum.

[88] For Carl Schmitt "authority proves that to produce law, it need not be based on law" (Emden 2006)P1). This postulate, however, justified one of the darkest moments of human history.

[89] Kant argued that the moral law is a matter of one's legislation for oneself (Finnis 2002)P7), but he did not provide reasons for action.

achieve that end. Power is materialized in authority which is expressed through law. Not all power is expressed through law, but all law is an expression of power. Law is a social construct that those that are recognized "the right to law" intentionally create through a social process according to their purpose. Law protects the space of those that create it, but also embeds the language of rights in the conception and the application of power.

Rights are sociocultural artefacts of a particular historical phase of development of human societies (Jovanović 2012)P68)[90], the result of certain expressions of power and of the narratives that explain that relationship in a particular time, and under specific circumstances. They are part of the general project of social rationality (D. Kennedy 2013)185), a "key element in the universalization projects of ideological intelligentsias of all stripes" (D. Kennedy 2013)P188). Because social and cultural objects are the product of human intentions (Thomasson 2007)P52), rights, as cultural products, are the product of intentionally created narratives which are embodied, most times, in legal rules that are themselves "often ratificatory and regulative rather than truly constitutive" (Finnis 2002)P26). Law is the codification of rights that have passed the narrative test of those that have the right to law.

Grasping the concepts of power and rights requires understanding the process by which the narratives about those concepts are constructed, that is, how societies form a social, moral, ethical and political image of what it is implied by the notions of power and rights. Foucault believed that power is linked to the formation of discourse within specific historical periods[91]. Power, therefore, needs to maintain a specific type of narrative (Sokhi-Bulley 2016). No legal institution or normative order can exist separate from the narratives that provides it with meaning and that sanctions its very existence. In fact, for those subscribing to Habermas´ theory of communicative action, the normative value of norms is necessarily implied in the discourse, not necessarily in the self-understanding that agents may have of that norm, nor in the legal form alone, but in the discourse theoretical process of giving concrete shape to the initially unsaturated concepts or basic rights (Forst 2017)P19)[92].

[90] Foucault too treats law as a historical formation and does not decide its distinctive features, function, or field of influence in advance He brings to the fore the implicit patterns in the discourses and the discursive practices that produce a historical formation (Brännström 2014)P176).

[91] Charles Tilly argues, and I agree, that in the study of contentious politics one needs to move away from simple event count toward procedures that trace interactions among participants in multiple episode (Kriesi 2009)P344) that is, one needs to examine the multi-factor, no-time-specific, socially grounded narratives around the engagements, not the engagements per se.

[92] For Habermas, what civil disobedience implies, and defends, is the feedback connection of the formation of political will with the informal processes of communication in the public space (Quintana 2009)P63), that is, the debate among the forces of society in the space where rights are created and contested, the *ius politicum*.

The possibilities of the narrative are vast, if not endless. Narratives can shape the most fundamental ideas about ourselves, about our values and about what we believe we are entitled to. Language imposes meaning and manipulates our perception (Nieminen 2017)P7). We believe, for instance, that the language of rights has a higher value than the common language because it embodies the aspirations and the values of the *grundnorm*, the latter being in itself a narrative, albeit the one with the highest significance. It then follows that the interpretation that we give to the notion of rights is contingent on our adherence to a specific narrative, because what rights can mean in a substantive, and not only in a formal sense, always depends on the principles or values to which a person or a group of persons feels committed (Brumlik 2017)P25). Rights, therefore, are not just morally grounded, they are justified by an internal interpretation of the discourse around them, and by the legal form that they take. The concept of rights, as a specific artifactual kind created by human intention, is determined (often gradually and collectively) by power, by the makers' concepts about what features are relevant to kind membership (Thomasson 2007)P80). Just as Foucault argued that political struggles over what human rights included, and what they excluded, defined the content of "the human" in whose name these rights are claimed (Golder 2015)[93], political struggles over what rights mean, what they include and what they exclude, define the very content of those rights.

The language of rights, or more concretely, the language that appeals to rights, is, consequently, what creates rights. Robert Cover uses the term *jurisgenesis* to refer to the creation of legal meaning by the *nomos* (Wilson 2017)P139), the normative universe of different social groups within a society, a process of meaning-creation that takes place in the public sphere, in the political. The language of rights, and rights themselves, are fundamentally political in the sense of being open, provisional and subject to on-going contestation (Aitchison 2017)P8). They have become a common feature in the political discourse and central to the causes of those that take the streets, but rights, and their meaning, remain essentially an instrument in the hands of those that can impose their narrative over the appeals, or the legislating power, of others.

Law´s epistemic nature is politics, understood as a public exercise through which power is actualized in connection with the values of the ideology. Those values, and the societies built around them, are threatened when law´s epistemic nature ceases to be politics and instead becomes just power. When power is asserted in a commanding and excluding manner, even within liberal democracies, law is pulled in conflicting directions seeking to

[93] In fact, Foucault´s obsessive examination of power focuses on the human. For him, the disciplines of the body (the anatamo-politics of the human body) and the regulation of the population (biopolitics) constituted the two poles around which the organization of power over life was deployed (Muller 2011)P7).

fit the purpose of the power while remaining truthful to the narrative that create it[94]. Law then becomes a paradox in itself, "a vehicle simultaneously of governmentality and of its subversion, of subjection and emancipation, of dispossession and reappropriation" (Maurer 2004)P844). When politics is law´s epistemic source, that is, when power is asserted in the public space in a manner consistent with the principles of the ideology, law acquires its full normative, performative, and moral value[95].

Today, law is expanding as it assumes the characteristics of contemporary society. As power is exerted in a multitude of forms, law is increasingly becoming dispersed and fragmented, responding to a multitude of private, corporate, political and transnational interest from which the individual is, most times, left aside. The financial markets have replaced the sovereign people (Douzinas 2021). Law and sovereign power are increasing displaced by discipline and bio-power which function through the norm (Piška 2011)P252). Some point out that what we are seeing is class war from above, in which the rich are bailed out by all others (Canaan, Hill, and Maisuria 2013)P179), a practice that one can deem immoral, but that the elites ensure is not illegal. Law has transformed itself into a network of norms continually under negotiation among a plurality of private and public actors (M. P. Golding and Edmundson 2005)P11), reflecting the contrasting (yet not necessarily opposing) views about the actualization of power. This is a law with force, but without normative weight beyond the ideological preferences of ruling elites masquerading as scientific policies (Douzinas 2014a)P88).

2.2.1. *Violence.*

Violence, too, is an expression of power. Foul power perhaps, but power. From Aquinas to Rawls, scholars have historically sought to settle the debate whether violence in a political engagement nullifies the act or delegitimizes the engagement. As Hannah Arendt noted, no one concerned with history and politics can remain unaware of the enormous role violence has always played in human affairs (Arendt 1969)P2). In that same debate, scholars have also questioned the use of violence by the state and wondered about the moral limits of exerting power by force[96].

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[94] As Weber said, "the facts of life are juridically construed in order to make them fit the abstract propositions of law" (Tamanaha 2017)P113).

[95] Moral value in the sense of Lon Fuller´s "inner morality of law", which I will later discuss. Legal scholars have traditionally believed that much of what legitimates law and distinguish it from other forms of normativity are the procedures by which it is created and applied: adherence to legal process, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning.

[96] "If force creates right, the effect changes with the cause: every force that is greater than the first succeeds to its right (…) But what kind of right is that which perishes when force fails? (Rousseau 1762)Book1).

Through action, response and adaptation, the state and those that assert their right to resist engage in a competition to outpower one another[97]. Because resistance is a reaction to an expression of power, then the tactics pursued by that power affect the type of external expression of resistance that ensue. This includes the possibility that the external manifestations of the right to resist, themselves expressions of power, include force or some forms of violence, or that the state, in its attempt counter expressions of resistance (whether factual or not) or to coerce people into obeying, makes use of violence. A different question is whether the state (*qua* state), has the right to resist (*qua* right)[98].

I depart from a basic premise, that resisting oppression by exercising the liberties it attempts to curb is a right, and that right is unaffected by the occurrence of violence (Finlay 2008)P97). It would defeat the ambition of universality of my theory of the *ius resistendi* to disregard the fact that violence might be present in its external manifestations[99], and it would also defeat that ambition if I was to condition the existence of the *ius resistendi* to the forms that its external expressions take. There is a fundamental difference between violence as the consequence of an action (e.g., the actual assertion of a right), and violence as a defining part of that right. Violence is a political term, one which is used to define a wide range of behaviours and actions, from acts of terror to murder to certain forms of speech. Since there is no universally agreed meaning, significance, or definition of what constitutes violence, the claim that the presence of violence can be a defining part of what constitutes a right is in itself a contradiction. I agree, following Judith Butler´s reasoning, that the presence of violence or not cannot be, in itself, a principle that defines a right if by a "principle we mean a strong rule that can be applied with the same confidence and in the same way to any and all situations" (J. Butler 2009)P165). And yet, violence is frequently

[97] Erica Chenoweth notes that one of the reasons why nonviolent resistance has decreased in efficiency during the last decade is the adaptation of the State to nonviolent challenges and developed a repertoire of politically savvy approaches to repression, for instance infiltrating movements and provoking violence from within them (Chenoweth 2020)P76). I believe that what weakens the political and strategic sustainability of an external expression of the right to resist is to dissociate that political strategy from the normative framework in which it takes place. The language of rights endures in society much longer than the language of politics and provides a much stronger foundation for a long-term strategy that seeks to fit within the ideological framework, and, at the same time, surpass it.

[98] I, however, agree with Weinrib that unlike a private person, a state lacks the right to determine its own end (Weinrib 2014)P720).

[99] The ECHR considers the possibility that violence may occur in a demonstration. According to the Court, it is the intention to hold a peaceful form of assembly that is decisive in evaluating whether Article 11 of the European Convention on Human Rights (ECHR) is applicable (Council of Europe 2013)P8). A participant in a demonstration does not cease to enjoy his rights under the ECHR because of the violence or other punishable acts committed by others during the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior.

used by the state as the measure to judge the validity of the *ius resistendi qua* right[100], as well as the justification to use of violence against those that resist.

As the instrument that can, and does, effectively limit the space where freedoms are exercised, law itself is instituted on the notion of violence, both structural and systemic. Legal systems are, in most cases, the outcome of force, the progeny of war, revolution, rebellion or occupation (Antiphon 2009)[101]. Law is invariably violent as regards the limiting force it can exert (Van der Walt 2010)P213). There is, in Foucauldian terms, an intrinsic, transhistorical tie between law and a certain negative, repressive, modality of exercising power (Brännström 2014)P177). Law can be the source of justice and injustice at the same time, and bearing in mind the massive intrusion of criminal violence into politics (Arendt 1969)P4), if we consider the extant violence-based legal order as legitimate, then there is no reason why we should not consider legitimate the exercise of certain rights and freedoms within that order, even if the expression of those right is not free from violence.

In the public space, violence generally presents itself as the alternative to the lack of dialogue and the result of the breaking of politics[102]. But not all violence is the same. When part of an external expression of the right to resist, one must clearly distinguish between object-violence and body-violence, a distinction that is not only semantic, but that relates to the very essence of what is ethically, legally, and politically permissible in the ideology and determines whether one (as moral being and as political agent) can ethically justify its use.

There is no possible moral or political defence of body-violence. Body-violence is an action exerted against a person or against people, against their physical integrity or their moral standing, is a force applied with the aim of hurting, of restricting people´s freedoms or exerting psychological pressure (Celikates 2017)P2). Body-violence attacks the very essence of humanity and the measure of all things, the human, and with it, the source of reason. Body-violence removes the epistemic nature of any of its possible outcomes, it dehumanizes

[100] The ECHR has held on several occasions that "if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion" Case of Alekseyev V. Russia (Applications nos. 4916/07, 25924/08 and 14599/09) of 21 October 2010, para 77.

[101] "European civility was in fact the contingent product of a complex historical process, traceable to the fifteenth century, of the gradual pacification of society through the repression of individual tendencies to violence (…) in part by reinforcing existing socio-political hierarchies. And it achieves this by marking disruptive practices, including practices of dissent, as un-civil, unrefined, not to be taken seriously" (Edyvane 2020)P98). Walter Benjamin argued about the forms of "law-preserving violence" that the constituted power would take as inseparable from state power, whereas revolution (divine violence), would be an example of a form of constituting power, or "law-making power" (D. C. Barnett 2016)P433).

[102] As Herbert Marcuse argued, "the ways should not be blocked on which a subversive majority could develop, and if they are blocked by organized repression and indoctrination, their reopening may require apparently undemocratic means" (Marcuse 1965)P100).

the political, and without reason at its centre, the political proscribes itself. The irrational then takes over, and we revert back to a Hobbesian brutish, short and nasty state of nature.

Against things, one applies object-violence. I define object-violence as the use of force against unanimated objects in pursuit of a political or a communicative aim, without causing harm to people or to the most essential values of the ideology: dignity and freedom. The use of force against objects and interests, usually an expression of the clash arising from the actualization of power, must be always morally and rationally defensible (which does not necessarily mean allowable). A riot does not follow from motives that are considered a moral obligation. The difference between a riot and an external expression of the right to resist lies not in the methods used (both can resort to object-violence) but on whether these expressions are politically motivated, public, rational and morally grounded, as well as by the legal consequences that they create both for the resisters and for the state[103]. A riot is an irrational, anger-driven social expression caused by the lack of capacity of rational group deliberation (which would include a choice of political means and a rationalization of the grievance in the language of rights), caused by the oppression of the state or by non-public interests upon specific groups of population[104]. The intent of rioting is destructive, and while one can sometimes understand the reasons behind frustration and emotional outbursts, the engagement does not qualify as an external expression of the right to resist.

The Greek, Roman and medieval conceptions of the *ius resistendi* embraced as lawful and legitimate expressions that could contain violence, for instance, tyrannicide or resistance against the King by arms. The liberal concept of civil disobedience rejects violence. Liberals defend that while the use of coercive tactics may be required in authoritarian regimes, it is not appropriate in democratic states with a broadly egalitarian ethos (Aitchison 2018b). John Rawls discarded the use of violence "because any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act" (Rawls 1991)P106). Liberal literature, I maintain, converged mostly on non-violent expressions of the *ius resistendi* because non-violence removes, to a great extent, the burden of justifying otherwise morally ambiguous expressions of discontent, especially when those are caused

[103] Paradoxically, the European Commission of Democracy through Law (the Venice Commission) considers that "non-peaceful gatherings, involving coordinated and persistent assaults on State institutions and other similar violent incidents" can be described as riots (R. Barrett et al. 2021)para 50). I, however, consider that a riot is, primarily, a social outburst without a clear political purpose or coordination, and that is not sustained over time. Recent publications also consider that the rise in world protests "were not random, unorganized riots; the majority of world protests were planned, and their demands were articulated", the main grievances and causes of outrage being the failure of political representation and political systems, economic justice and anti-austerity, civil rights, and global justice (Ortiz et al. 2022)P113).

[104] Oppression understood as a social circumstance (political, legal, cultural, or otherwise) that systematically and wrongfully burdens a victim's autonomy or overall life prospects. Oppression is often the cumulative effect of diffuse norms, actions, practices, and institutions (Silvermint 2013)P405).

by the failure of the state to uphold its obligations, not because violent expressions of discontent are morally unjustifiable.

Object violence needs justification, and, in some cases, it can be justified. Under certain circumstances, "violence is the only possibility of setting the scales of justice right again" (Arendt 1969)P13). For Michael Ignatieff, European liberalism has typically endorsed some limited rights to deploy violence for political purposes, since rights would not be ultimate claims were they not worth defending (Finlay 2008)P86-87), even if this defence includes the use of violence and force (Ugartemendía 1999)P214). For Tony Honoré, too, by calling "rights the values that we define as human rights in western culture, we want to distinguish them from mere aspirations by acknowledging the right to seek a remedy, even a violent one, where this is the only possible means of achieving or protecting them (Honoré 1988)P34). Hugo Bedau concluded that civil disobedience ought not to be defined by reference to nonviolence (Bedau 1972)P183), since the decision whether to act violently emerges as a tactical, not as a principled, matter (Bedau 1991)P8). Jean Paul Sartre went further in his justification of violence, arguing that any violent resistance must be ethically grounded in the whole community that is being oppressed, but also that there is no logical reason why this argument should not be equally deployed for a minority community, particularly in the face of sectarian tyranny enforced by the majority (Young 2011)P47). And even the first president of the Federal Court of Justice of the Federal Republic of Germany, Hermann Weinkauff, advocated positive resistance, even violent resistance, against the despotic state authority (Schwarz 1964)P128).

For some critical scholars, especially for those that advance the notion of "uncivil disobedience", a certain degree of violence is now considered, perhaps, even necessary. Prompted in part by controversies surrounding militarized and racialized policing, critical scholars justify violence when it is either a tactic of self-defence, or a means of rescuing others from the immediate threat of harm (Delmas 2019a)P244). They contend that "the claim that disobedience has to be nonviolent in order to count as civil can be contested with good reasons, not least because the vagueness of the notion of violence lends itself to political instrumentalization" (Celikates 2014a)P434). Still, others think that civil disobedience need only be largely non-violent, or aspirationally nonviolent, and even then, primarily with regard to persons and not necessarily with regard to property, or even as self-defence in the face of assault by others, such as the police and security personnel (Milligan 2013)P14). Others argue that the right to resist oppression justifies coercive tactics in all cases where, in general, such tactics have a realistic chance of providing less oppressive social relations (Raekstad and Rossi 2020)P12). In any event, what seems clear is that disruption is not incidental to the success of protest movements, it is essential (Engler and Engler 2016), and that disruption often involves some sort of force.

The perception that violence might be somehow justified in some circumstances is not only raising in academia, but most significantly with the common people. Current resistance networks conceive their political engagements as forms of community self-defence, and believe that any force they might use is fundamentally different than the coercive violence of their opponents: murderous cops, polluting energy companies, statists, capitalists, and fascists (Loadenthal 2020)P15)[105]. While the growing acceptance of violence from those that resist may be regarded as a worrisome indication that people increasingly find impossible to obtain solutions within established democratic channels, it also demonstrates that more people are willing to risk their integrity to defend principles and values they consider fundamental[106]. Current trends are not necessarily bad news for democracy, although these trends are usually portrayed as bad news by the mainstream media, and any expression of violent behaviour, even by a small minority within a movement, "is food for the adversary" (Etzioni 2020)[107].

Like rights, violence is formed around its narrative. Violence is political, and it is the negation of politics at the same time. It is contingent on its source and on its purpose, on the story around it and on the consequences for those with the power to sanction it. Violence

[105] For instance, the "Principles and values of the environmental movement "Extinction Rebellion UK" says that "we also recognize that many people and movements in the world face death, displacement and abuse in defending what is theirs. We will not condemn those who justly defend their families and communities through the use of force, especially as we must also recognize that it is often our privilege which keeps us safe. We stand in solidarity with those who have no such privilege to protect them and therefore must protect themselves through violent means; this does not mean we condone all violence, just that we understand in some cases it may be justified. Also, we do not condemn other social and environmental movements that choose to damage property in order to protect themselves and nature, for example disabling a fracking rig or putting a detention center out of action. Our network, however, will not undertake significant property damage because of risks to other participants by association". https://extinctionrebellion.uk/the-truth/about-us/. Many of the protestors do not consider themselves activists and yet they protest because they are disillusioned with official processes, political parties and the other usual political actors associated with them (Ortiz et al. 2022)P113).

[106] The death in police custody of George Floyd, a 44-year-old African American man, on 25 May 2020 in Minneapolis (USA), sparked a wave of anti-racism protests in the U.S. and around the world. A CNN Poll conducted by SSRS from 2 to 5 June 2020, after the U.S. nation-wide "Black Lives Matter" demonstrations that first surfaced in 2013, found that a majority of Americans (84%) justified the peaceful protests across the country after police violence against African Americans, and roughly a quarter (27%), said that violent protests in response to police harming or killing African Americans were justified (Agieska 2020).

[107] The West has greatly expanded its interpretation of what constitutes violence, mainly as a mechanism for societal discipline and control, and has become less permissible of any form of direct confrontation. Habermas, for instance, referring to the position of some German politicians that declared that nonviolent resistance is violence, noted that "the advocates of a tightening-up of the law regarding demonstrations have pursued a course in which they attempt to extend the juridical concept of violence beyond actual violent acts to include unconventional means of influencing the formation of political will" (Habermas 1985)P96-97). One must, as some insist, understand the communicative aspect of the external expressions of the right to resist beyond the ritual denunciation of acts of violence as "outrages" or even "terror" that are always voiced by politicians and commentators (Young 2011)P56).

is to power what punishment is to law. Violence appears where power is in jeopardy, but left to its own course, its end is the disappearance of power (Arendt 1969)P13), at least of legitimate, democratic power. Violence can be used as a tool of coercion or of liberation. State violence strengthens the coercive role of the state while undermining the role of resistance. Object violence may reinforce the power of the people, but it undermines the legality of rules. All forms of violence are, from whatever perspective, flawed, but some are perceived as being more flawed than others, and it is oftentimes only the violence exerted against structural (state) violence that is visible, and it is that visibility that provides the standard for censuring violence rather than the violence exerted by law, power or authority.

The state does not merely use force, its reaction to legitimate assertions of the right to resist (emphasis added) is always violent, not necessarily because of the physical harm that police or security forces may inflict[108], but because of the imbalance of power between the state and those that resist, and because of the state´s capacity to severely affect the normative status, and even the lives, of those that legitimately assert their right[109]. While resisters may be organized in their use of (object)violence, that violence is usually limited to a specific political strategy to challenge a particular law or a policy[110] and generally uses a language that appeals to rights. The "harm" that resisters inflict on the state is political and usually depersonalized. Inversely, the response of power primarily targets the individual (the organizers of a campaign, the participants in a demonstration, the members of a civil society[111] or political group) and uses the language of criminal law with the aim to punish.

In domestic affairs, violence functions as the last resort of power against criminals or rebels, that is, against individuals who refuse to be overpowered by the consensus of the majority (Arendt 1969)P11). By labelling someone, or some action, as violent, those that control the narrative that create rights, nullify the engagement and deprive it of any pretence of legality or legitimacy. Appealing to irrational, primeval concepts, post-democratic regimes[112] have

[108] Contrary to public perceptions, riots and protests involving violence and vandalism/looting represent only 20% of the total of 2809 protests that occurred between 2006 and 2020 worldwide. Repression is documented in more than 60% of the protest episodes analyzed in the study, taking the form of arrests, injuries and deaths due to state-organized violence (Ortiz et al. 2022)P114-116).

[109] "All attempts to understand legal judgments and judicial decision-making as exclusively hermeneutical are incomplete. Whatever else judges do, they deal in fear, pain, and death. Legal decisions lead to people losing their homes or children, being sent back to persecution and torture: legal interpretation leads to people losing their lives" (Antiphon 2009).

[110] As Kent Greenawalt notes, it is often difficult to determine the exact law or policy that the disobedient person seeks to protest; thus, the application of any rule permitting nonviolent disobedience which is directed only at the challenged law or policy might be elusive (Greenawalt 1970).

[111] Antonio Gramsci conceptualized civil society as an arena of contestation, which could both strengthen or resist the hegemony of the (bourgeois) powers (Buyse 2019)P17).

[112] By post-democratic I refer to a system formally democratic, but fundamentally distorted by practices that have transformed it into a regime that is not undemocratic, but that is not democratic.

been able to resist resistances both as political concepts and as normative possibilities, managing most external expression of the *ius resistendi* through violence, either through "lawfare", the politization of the judicial[113], or via the police[114]. This response is, however, counterproductive. When a government uses violence against its citizens, the government is as liable to resistance as any other oppressing power. Many scholars concur that the use of force by the state destroys, rather than protects, the democratic culture that it pretends to defend, and that the use of the criminal justice system to defend the egalitarian democratic culture in a society, that is, the combination of the terms force and democracy, are hard to reconcile (Ellian and Molier 2015)P256). If violence is not the way to demand justice, why would it be the way to restore order? Why do we consider violence from above (violence used by agents of the state), as morally superior to violence from below (violence from the oppressed resisting their oppression)? (Garland 2012)P9).

Modern expressions of dissent arise from the actualization of power in the framework of the contemporary ideological indeterminacy, an uncertainty that causes people to question whether the order and its institutions are legitimate. Questions about legitimacy are the result of the increasing disconnect between the ideological foundations of the system and the prevalent discourse of political legitimization. Western societies live under the constant assault of external threats and pressures, menaces that have overwhelmed the moral and ethical institutions of a system that has been unable to respond to the anxieties of fear and has, instead, responded with force, and without reason. In this estranged environment, as Stellan Vinthagen argues, the violence by the State (including linguistic and discursive attempts), should be understood not as proof of its might, but rather a demonstration of its absence, a failing of State power and a forced retreat to its barbarity (Loadenthal 2020)P18).

The discourse of order and security, for instance, has replaced the enlightened discourse of freedom and equality as the basis for the actualization of power, and with it, the form in which citizens relate to the state or rather, the form in which the state exerts power over the people. Consent is becoming irrelevant as we are told that there is no alternative to the

[113] For Britta Rehder the term "politization" suggests that politics invades the legal sphere, while the term "juridification" is one in which the judicial action invades or displaces politics. From Spain to Poland to Hungary, courts are being increasingly politicized. Court interferences in the political reflect the political power behind the Court as a branch of government. Jacques Rancière argues that juridification and rule by law is "not so much the submission of the legislative and the executive to the "government of the Bench"' as a declaration of "no case to answer" for any public manifestation of conflict (Rehder 2007).

[114] When talking about the use of pepper spray on protestors, Tony Milligan makes an interesting reflection: "if its use would be illegal on the battlefield, there is a question about why it should be considered legal on the streets" (Milligan 2013)P2). In his account of the 25 May 2011 events in Syntagma square, Costas Douzinas notes that "the police attack in and around Syntagma turned the center of Athens into a battleground (…) the Greek Medical Association and the Athens Bar stated that such extensive use of chemical weapons in times of war amounts to a war crime" (Douzinas 2013)P149).

security of the state (Wood and Fortier 2016)P9). The consolidation of this security-focused narrative has relied, to a great extent, on the ability of the state to mobilize the symbols of power, particularly the law and the force of the police, a force that is applied with little reference to justice, morality or democratic legitimacy (Douzinas 2013)P45). In the pursuance of the objective of countering resistances and consolidating order, democracies have tended to provide disproportionate discretion to the police to determine the balance between legitimate protest and those considered to be a disruption[115], and between the exercise of freedoms and the maintenance of public goods (including order and security). The delegation of the use of legal(ized) (body)violence against those that assert their right to resist has the effect of releasing elected officials from their responsibility to adjudicate moral reason, thus somewhat discharging the state from its obligation to protect basic rights[116], that is, from its obligation to upholding the basic tenants of the ideology that sustains the state itself.

Some view state violence against demonstrators or political opponents as an act of state terrorism, a pre-emptive policing (Garland 2012)P10) designed to strike fear into potential protesters, dissidents or even observers, seeking to provoke a chilling dissuasion effect. Such aggressive policing and state violence is intended to send a message to anyone willing to assert her right to resist that political demonstrations that challenge the status quo are not to be tolerated. When the state uses violence, it seeks its own justification and the pursuance of its own existence at the expense of the rights of those that form the collective[117], it de-humanizes people, and when the opponent is dehumanized, then the burden of respecting its rights is lessened, and the use of violence is justified as a necessity to protect the order from the morally inferior. Interventions with an agent's physical integrity, that is, the application of body violence, is equivalent to treating the agent as a morally inferior being compared to the intervening agent (Andersson 2015)P1643). Police

[115] The escalation of the number of police aggressions against protesters is a clear indication that the democratic state is willing to use strong measures to deter protest that threatens the status quo (Canaan, Hill, and Maisuria 2013)P11). Only in the decade of the 80´s there were nearly 37,000 individuals arrested for protest activities (Lippman 2012).

[116] In Case of Alekseyev V. Russia (Applications nos. 4916/07, 25924/08 and 14599/09) of 21 October 2010, the ECHR stressed that, para 73, "freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents. It is thus the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully".

[117] Astonishingly, for instance, in its Ruling 91/2021 of 22 April 2021 (BOE no 119, of 19 May 2021), the Spanish Constitutional Court argued that a peaceful but massive demonstration may be seen as a way to prevent the police from using force which, at the end of the day, may disrupt the normal functioning of the state powers (Urias 2021).

brutality has become in itself a political feature, a usual state response to actions of dissidence under the cover of its Weberian legitimacy.

Indeed, the Weberian principle of the state´s monopoly of the legitimate use of physical force remains the defining feature of sovereignty. The defining feature of the democratic ideology is the principle that delegation is constrained. Democracy creates a situation where the state is never fully released from its duty (not the right) to govern, and from its obligation to protect people´s rights, that is, to realize a system of law that conforms to the terms of its own justification (Weinrib 2014)P720). A Lockean logic would then reason that the legitimacy of the monopoly of force should be contingent on the fulfilment of the state´s obligations to govern and uphold the rights of citizens. Consequently, if the state was to fail in fulfilling those obligations, and thus maintain an unjust condition, then it should not be entitled to having the monopoly of the use of force. Using state force to unjustly deter the legitimate claim of rights from citizens is wrong. Even John Rawls reasoned that, ultimately, the responsibility for social division rests not on those that resist, but on the authority that has maintained unjust institutions, "for to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist" (Rawls 1999)P342). But logic and politics are not always good companions. In democratic liberal orders, legal relationships have tended to provide nominal rights to people, and consequently nominal duties to the state, while bestowing real rights to the state, thus imposing real duties on people.

In this logic of contention, the claim of the monopoly of force, and of (body)violence, embodies the expression of the superior rights of the state in relation to the rights of citizens. It is the *raison d´état*, a notion that epitomizes the ultimate bulwark of the state to defend itself against any threats to power, especially when the menaces come from within, and for legitimate reasons[118]. The "reason of state" is always at the rearward of all political theory, and of all political action, emerging as the unquestionable reason for state intervention in ways that can limit the enjoyment of fundamental rights. The notion of the *raison d´état* implies, fundamentally, that there are no binding obligations, that there are no unbreakable principles, even those that provide the basis for the very existence of the state, and that certain values can be transgressed to promote others, even if those values defy the very nature of the democracy.

In his Sprit of the Law, Montesquieu already cautioned that "legislative enactments that clash with prevailing moral and social norms may well fail and may require tyrannical force to be effective" (Tamanaha 2017)P16). Because the appeal to the *raison d'état* is made without

[118] In Machiavellian terms, the reason of the state is a break with the ethical and legal order, in a permanent precept: the State knows no other law than the desire for its own conservation (Gómez Orfanel 2021)P197).

citizens, and even against citizens, the state does not need justification for "its" reason, which means that it does not need to rationalize the reactions against those that do not abide by the same rationality. The violence of the *raison d´état* expresses itself in an aggressive institutional way, purportedly or not, provoking a collision of constitutional rights, fundamental principles, security concerns, appeals to order, and the stigmatization of violence when used by others to maintain its margins of political dominance. The *raison d'état* transforms the state into the only moral measurement and the sole interpreter of the *ultima ratio*. The political is delegalized and turned into raw power. The *raison d'état* embodies the Schmidtian "exception", it expands the delegation, and like the *ius resistendi*, it exposes the real mechanisms that the state uses to generate obedience or allegiance. And yet, the *raison d'état* and the *ius resistendi* are, ironically, born out of the same need, that of vindicating power.

We are witnessing a worrying democratic drift, an erosion of basic principles of justice and rights, not tyranny per se, as the identifiable source of injustice, but tyranny of exercise (Pelloni 2000)P5)[119]. Tyranny of exercise defines those regimes that are legitimized in their legal and democratic origin, but that may be repressive, oppressive or unresponsive in their exercise, a situation where democracy is demoted from a formative principle to a largely rhetorical function within an increasingly corrupt political system (Wolin 2008)P131). This tyranny of exercise is currently enabled by the lack of counter-power to neoliberalism and to the biopolitics and governmentality approaches to managing population (Muller 2011)P4), practices that have instituted a semi-tyrannical mode where no one has really much to say. Tyranny of exercise epitomizes the delegation of the institutional obligation of the authority in regard to the rights of those that resist, and those that do not[120].

2.3. Genetic reasons; the morality of law.

Legal positivism posits that what the law is can be identified without moral or evaluative concepts as to what the law ought to be in particular circumstances. Positivist accounts simply examine the legal system *qua* system of rules, the description of normative hierarchies (Zipursky 2006)P1245). It proposes that state law is, or should systematically be

[119] In the words of the UN Secretary-General, "there is a growing disconnect between people and the institutions that serve them, with many feeling left behind and no longer confident that the system is working for them, an increase in social movements and protests and an ever deeper crisis of trust fomented by a loss of shared truth and understanding (Our Common Agenda 2021)P22).

[120] European institutions, for instance, have been "effective" in taking harsh measures to neutralize resistance. As White notes, "in the light of the Syriza experience in 2015, when the threat of disobedience towards the demands of the emerging Eurozone regime was evoked only to be soon discarded, the prospects for resistance of this kind in the EU may currently seem remote. Indeed, given the scale of the power resources that can apparently be applied to forestall it, consideration of the normative basis for such a counter-politics may seem wholly premature" (White 2017)P2).

studied as if it were, a set of standards originated exclusively by conventions, commands, or other such social facts (Finnis 2002)P9), norms that in order to fulfil their function should meet certain procedural requirements so that the individual is enabled to obey them (Sypnowich 2019).

At its fundamental core, some believe that positivism developed around one central question: can law be bad? (Tamanaha 2005)P6). Although positivism does not reject the possibility that the law may contain moral principles[121], it considers the rule of law as value-neutral, or content independent in the case of H.L.A. Hart (Valentini 2018)(Finnis 2002)P23), and proclaims that the very strength of the idea of the rule of law, understanding law in its formal and procedural meaning of having the status of a law, stems precisely from its moral neutrality (T. Smith 2011)P51)[122]. Value neutral theories sustain that a lawful act does not need to be morally right, as long as the law permitting the act had been lawfully enacted through legitimate law-making powers and procedures[123]. This could be determined, Hart argued, through the acceptance of the rule of recognition as a social rule, effectively setting the accepted common public standards of official behaviour by the system's officials (Boos 1996)(Zipursky 2006)P1233).

Positivism tends to favour the stabilizing nature of law and with it, the *status quo* of power. Hart´s rule of recognition is, in essence, a rule of recognition of power, and a rule by which power (in the form of law), is recognized, because change, adjudication, and recognition are opportunities to ascertain the power of those with the power to change, adjudicate and recognize. For positivists, including Raz, the reason why achieving a value neutral rule of law system can be an appropriate goal for regimes across the globe, is that it does not commit a society to any particular ideology. And this is, precisely, my fundamental disagreement with positivism, for the ideology is the *grundnorm* of any normative order.

[121] Hart always acknowledged that in legal systems such as the United States "the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values" (Bellamy 2015)P7).
[122] But "procedures can imbue even substantively mistaken laws with (the) authority these laws would otherwise lack" (Viehoff 2014)P342).
[123] I am aware of the simplicity of the argument I put forward, as both Hart and Raz have developed complex theories in which they elaborate the link between law and morally permissible acts. Hart and Raz have argued that legal positivism is committed only to the idea that because what is law is a factual question, law's legitimacy can be determined by moral criteria outside the law that might recommend disobedience, and that although law may meet moral criteria, what the law is and what it ought to be should be kept distinct (Sypnowich 2019). Inclusive positivists argue that legal positivism can allow moral tests of legality without requiring that they consider the manner in which it has been enacted. Even exclusive legal positivists like Joseph Raz, while affirming that all law is based upon and validated by social-fact sources, also accept that judges can have a legal and moral obligation to include in their judicial reasoning principles and norms which are applicable because, although not legally valid they are, or are taken by the judge in question to be, morally true (Finnis 2002)P9).

There is no order in an ideological vacuum. Whether one abides to a particular ideology or not is, however, a different matter.

I agree with those that assert that law is a valid ideal only because it is a moral good that serves a morally worthy purpose (T. Smith 2011)P51). Law cannot be purely procedural or content independent. What is morally worth can only be discerned within a value-based conception of society[124]. It is only when we ponder certain cultural and social objects through a "scale of worthiness" against other social and cultural objects that we can determine the value of the objects that we consider, including law, rights and principles. No value can be provided to any object unless is it measured against an ideological background, for good, or for worst.

Ronald Dworkin argued that the falsehood of legal positivism resides in the fact that it is incapable of accounting for the important role that legal principles play in the law (Ramsay 1978)P550). He suggested that a moral reading of the law is not only possible, but also unavoidable (Bellamy 2015)P4). Values, entrenched in legal principles, are the genetic reasons of the ideology, the scale that the ideology possesses to assess whether rules, norms and laws are morally (and politically) adequate. Dworkin asserts that "according to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice" (Altman 1986). In other words, law is valid as long as it reproduces accepted values.

Successful legal orders necessarily have morally acceptable purposes and aims (Lovett 2015)P2). After the second world war, the Radbruch formula, which contends that if positive law does not aspire to justice and if the equality which is the essence of justice is knowingly denied, the law is not merely false law, but lacks the very nature of law (Ellian and Rijkpema 2018)P101)(Tamanaha 2005)P11) was applied as the ultimate moral justification of "judicial resistance" against the validity of laws unbearably unjust or deemed to have trespassed all frontiers of decency. In its judgment of 24 October 1996, the Federal Constitutional Court of Germany[125] described the relationship between the criteria which together make up Radbruch's formula and the human rights protected under international law as being that the criteria of Radbruch's formula, which were difficult to apply because of their imprecision, had been supplemented by more specific assessment criteria, since the international human-rights covenants provided a basis for determining

[124] I speak of morality in reference to the justification of actions consistent with the essence of fundamental values and principles of the democratic ideology, rather than in its traditional acceptation which still remains heavily influenced by religious considerations.
[125] Cited in ECtHR Case of K.-H. W. v. Germany (Application no. 37201/97) of 22 March 2001.

when a State was infringing human rights according to the convictions of the world-wide legal community.

The moral righteousness of an ideology (not its validity, which is related to its resilience), depends on the justice or the injustice that it causes in relation to its own conception of justice, that is, on whether there is a disconnection between the actualization of power in the ideology and the ideal of justice that it represents. As a set of normative values that support the democratic ideology, law's moral righteousness is also directly related to whether it helps preserve or advance the ideological ideal of justice. Joseph Raz notes that "the morality of a government's laws measures, in part, its justice" (Raz 2012)P140). The other measure being the degree to which they are implemented in accordance with that sense of justice.

Since the public morality of any society is very definitely influenced by the law (Christie 1990)P1319), then one must accept that the opposite is true, that law is influenced by the public morality, a morality that is channelled through the political. The political idea that a society has of "the law", reflects how that society has come to morally justify the limits of power. Being ruled by the law means accepting (or at least acknowledging) that one is subjected to a positive moral idea of society, and that one is constrained by the moral justifications of maintaining that society (and its forms of power). The rule of law is the mechanism that establishes how legal narratives that reflect the values, and the political objectives of the ideology, are created. In other words, in a system of rule of law, legal coherency is due to a way of reasoning than to actual answers, and is due to, or biased by, the political objectives of the day (Schmoeckel 2002)P5)[126], not by a positive adjudication process. These political objectives are oftentimes not the result of the dispute between people and power, but among powers. The legislative, the executive and the judicial have always disputed the legitimacy to decide over "the limits" of democracy, of freedom and of rights, because they represent, in turn, different sources of power and of interests. The result of this aporia is that the rule of law, de facto, limits the capacity of representation of society at large in constructing societal narratives and in setting the limits of democracy, in spite of being inspired by those principles (Hidalgo Andrade 2018)P269).

Law has become the ultimate argument in debates about the ethics and the morality of politics[127], a debate that contains elements about the law´s own legitimacy as the gap

[126] Leslie Green argues that rights are as open to abuse as any other concept in political morality (L. Green 1991)P316) thus recognizing the political nature of rights and its possible utilization in common life arrangements for the benefit of those that can manipulate or control them.

[127] There is ample literature about the nature and role of ethics in the public sphere. I frame the notion of "ethics" following Hoover, in that we should think of ethics less in terms of rules, laws, and imperatives, and

between the actualization of power and the ideal of justice that it represents widens[128]. In principle, one would have reasons to assume that law equals good, or at least acceptable (Nieminen 2017)P31). But current debates about law and politics dispute this assumption. Some believe that we are facing a crisis of liquidation of the law, a crisis of "law for sale" (Pereira Sáez 2015)P271), as law tends to be reduced to a simple measure by and for the government, qualified to a specific and temporary situation which is oftentimes the result of political, non-transparent and non-inclusive processes which may even be technically defective. We are increasingly exposed to pretend value-based superficial narratives that enables power to justify, at the same time, a concrete thing, and its opposite. The question whether something is lawful or unlawful takes centre stage in political debates, while the substance of what kind of law or whose law, is left unaddressed (Gupta 2021), thus perpetuating the ethical and moral crisis that characterizes our current post-truth order[129]. The public debate has been filled with messages – not with ideas or values – which are often fake, of ethnic, social or gender superiority, messages that stir up the most ignoble feelings of human beings, messages that feed fear by appealing to fundamental moral values that are supposedly at risk (God, family, the nation, etc.) while avoiding any critical examination of those very values. Again, the cogency of the system is determined by the outcome of the narratives imposed by those who hold the means to do it.

Because in its current form law appears impersonal, and because it has the look of neutrality, its injustices are made legitimate (Zinn 2012)P904). Non-positivists find arguments that justify the *ius resistendi* precisely on whether there is an equilibrium between the changing nature of social morality reflected in the law, and the stagnation of the impersonal embedded in the legal, proclaiming that if moral obligations can, in some circumstances, trump otherwise legitimate legal obligations, disobedience may be justifiable (Loesch 2014)P1087-1088). Moral roles, and the responsibilities they generate, are understood in terms of moral reasons that come to apply to us as a result of the role we assume in society[130]. As Thoreau proclaimed, if our conscience tells us to act in a certain way in front of injustice, our moral role in engaging bears with it a certain responsibility (Oljar 2014)P294).

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instead understand ethical judgments in terms of the situational goods we value, which become the ends to which we provisionally commit ourselves (Hoover 2019)P26) in specific moments of uncertainty and disruption, when our claims or expectations are either blocked or denied.

[128] Tamanaha notes that "owing to formalistic aspects of law, legal results regularly diverge in content, operation and outcome from expectation and desires of the layperson" (Tamanaha 2017)P113).

[129] For Foucault, even truth itself is only a deceptive mask behind which we find rhetoric, or even coercion and simple violence (Wallenstein 2013)P10).

[130] Brownlee, for instance, argues that "excessive or inappropriate punishments (from the state) also would fail to respect the offender (the protestor) as a rational agent with whom the law may engage in moral dialogue" (Brownlee 2006)P4).

We are continuously negotiating that moral role with others in the way that we act, in the narratives we use and through our engagements. In each case, we are required to weight the objects that we can affect in the "scale of worthiness". This inevitably leads us to take a position regarding the relative merits of different moral values as reflected by the rights in question, "and some types of rights bearers' rights will be overridden whenever their rights conflict with rights of higher priority" (Andersson 2015)P1628). The most enduring challenge of law, and especially of the rule of law, is thus to regain its legitimacy by reconciling the need of legal stability with modern interdependent, expressive, complex societies that demand that they be recognized as rights bearers, and not only as duty holders. As Habermas argued, the political system has to be able to communicate through the medium of law with all the other legitimately ordered spheres of action (Finlayson 2016)P13).

2.3.1. *Dignity and justice*.

After the second world war, instead of the divine, liberal democracies adopted the notion of human dignity as the fundamental normative concept that shifted attention to the ideal dimension of law (Niemi 2018)P10). The second world war made the western world suspicious of its own nature. It made democracies reflect about the strength and the legitimacy of the genetic principles that had so far substantiated their existence. The immorality of some regimes that used the western notion of power and society, but that completely disregarded the human, compelled liberal democracies to embrace the notion of dignity and to re-dimension the nature of what it meant to be human, perhaps in an effort to condense into a single idea everything that was worth fighting for during, and after the war.

It is difficult to make sense of the concept of dignity since it is open and debatable in all its dimensions. I understand (the political concept of) dignity, as the element that humanizes a normative system that is built around an ideal of justice that puts the protection of the rights of the individual, and of the collective, at the centre of the political. A western, liberal, secular notion[131], intrinsically linked with the modern conception of human rights as the principled materialization of the ideal of the human, dignity is the element that connects the values of the ideology and the actualization of power as the measure to assess the rightness of the order. Judith Butler argues that when the human tries to order its instances, a certain incommensurability emerges between the norm and the life it seeks to organize (J. Butler 2009)P95). Liberal democracies have found in the concept of dignity a humane (not a divine or a rational) foundation for the legitimization of the actions committed by a de-

[131] As Rancière notes, secularism has been transformed into a moral obligation of the individuals themselves (Ranciere 2018)P48).

personalized power. Dignity is what restrains power to the human condition and has become the salient external factor to assess the performance of the state in relation to the principles and the rightness of power and its law.

A notion that in itself symbolizes the worth of being human, the term dignity has been embedded in constitutions, legal conventions and human rights instruments[132] and has been part of court decisions alongside a shared understanding of justice, to "provide a unifying creed unto which most nations can agree (at least in liberal democracies), even though the exact contours of that creed might not be specifically described" (Wilson 2017)P51). The European Court of Human Rights (ECHR), in the judgement of Féret Vs Belgium, emphasized that tolerance[133] and the equal dignity of all human beings constitute the foundation of a democratic and pluralist society (Ellian and Molier 2015)P130)[134]. In liberal democracies in particular, dignity has trespassed the realm of the ideal to become part of positive law and thus, some argue, it must be taken into account in a legal context since the sources say so (Niemi 2018)P3). As it has progressively become a positive concept, it has also been increasingly subjected to the polarizing interpretative forces that determine the value of the laws and the principles in the system. Yet in spite of becoming part of the legal reasoning of courts and legislators, dignity, like the *ius resistendi*, will continue to be an indeterminate term, for no power can legislate all dimensions of the human condition. As Hannah Arendt noted, man, it turns out, can lose all so-called rights of man without losing his essential quality as man, his human dignity (Arendt, 1973)P297).

As long as we feel that our dignity is being upheld, we will most likely conform to society´s terms. When that is not the case, dignity becomes the most formidable cause to appeal to the *ius resistendi*, for its disregard signals a situation of exceptionality where the application of power is considered to have violated something fundamentally ours, something that defines our own self, and our public self[135]. Both the concepts of dignity and justice appeal to some kind of ethical intuitionism, in the sense that we inherently assume that "a thing" called dignity, and "a thing" called justice exist and should be upheld, and that we are also

[132] Article 1 of the Universal Declaration of Human Rights declares that "All human beings are born free and equal in dignity and rights". Article 1 of the Charter of Fundamental Rights of the European Union reads "Human dignity is inviolable. It must be respected and protected".

[133] Marcuse argues, and I agree, that what is proclaimed and practiced as tolerance today, is in many of its most effective manifestations serving the cause of oppression, and that tolerance should indeed be a partisan goal, a subversive liberating notion and practice (Marcuse 1965)P81).

[134] For Marcuse, tolerance is an end in itself (Marcuse 1965)P82). As such, tolerance cannot protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation (P88).

[135] It is of course possible that a person violates the dignity of another person, but for the purpose of this work I refer to dignity, justice and other terms within the realm of the public.

inherently entitled to oppose any action that may deny or violate them[136]. But dignity and justice are not just felt, they do not just exist, they are ideological constructs themselves. At different times in history, dignity and justice had different meanings, and claims to dignity and justice had different responses from power. In our current context, as ideological constructs, the violation of the basic notions of dignity and justice amounts to a betrayal of the principles that validate the legitimate existence of the order and erodes its foundations. Ronald Dworkin, argued and that the legitimacy of the state rests on whether the state treats all those it governs with equal concern and respect their dignity person-by-person (Delmas 2016)[137]. Disregard for dignity and justice reverts democracies back to a stage where they need to re-consider their own ontological justification.

Justice is a concept as elusive as dignity. I agree with Amartya Sen in that it is easier to identify injustice than to say what justice consists (Delmas 2018)P15), and with Arthur Kaufmann, in the sense that "the essence of justice is resistance against injustice" (Kaufmann 1985)P571). Like dignity, the prevalent notion of justice is a construct of the ideology. Our personal account of justice is biased because it entails a political commitment to certain values and reflects a situated and contingent evaluation of what should be done (Hoover 2020)P10)[138]. Justice is a pre-legal concept that acquires different meanings depending on where it is located (Santos 2009)P252). Justice can represent an intangible ideal, a just system, a fair ruling, or a conception of society. We reflect about the meaning of justice because we acknowledge the existence of injustice. Injustice may materialize in a system that is essentially just, and justice may prevail in an unjust system. One must also differentiate between specific unjust acts and injustice itself, that is, the practices, institutions, political and economic structures, and cultural norms that enable unjust actions, while obscuring the true nature and extent of injustice in our world (Hoover 2020)P4). Injustice, as an act, can be redressed through a just system insofar there is no other systemic injustice that could impede those seeking justice to attain it. In an unjust system, there are also some occasions when one can be justified in acting unlawfully in the pursuit of justice (Caney 2015)P8), law and justice being separate concepts. For Derrida, for instance, justice is unattainable, while the law would be the attainable, manageable and

[136] For some, human dignity has three components: freedom, equality and solidarity (Torres Caro 1993)P396) as reflection to the "three generations" of human rights. Yet there are missing elements, namely the capacity or reason (to act with a purpose), and, as Yuval Noah Harari would argue, the capacity to work together. Without reason, the correlation between human rights and dignity propels the human being back to a stage of self-preservation.

[137] Dworkin considers that rights are an anti-utilitarian concept in being something that it would be wrong for the government to deny to someone, even though it would be in the general interest to do so (Bellamy 2015)P10).

[138] Political ideas must be tailored to meet the restrictions imposed by the political conception of justice and fit into the space it allows. Yet even John Rawls emphasized that the political conception of justice uses the political conception of good (Ivic 2010), in itself a moral concept.

deconstructible instrument through which justice is attempted. This, however, raises the impossibility of the complete realization of political ideals as well as the contradiction between the inadequacy and, at the same time, the need for law as a fallible and imperfect tool to try to attain those ideals (Sandoval 2017)P21), including that of justice.

Political injustice is the result of the imbalance between the values of the order and the ends that the state uses to achieve its objectives. Injustice exhorts people to reinterpret some of the fundamental conceptions that support the political order, including dominant interpretations of justice. We should not forget, Rainer Forst warns us, that there is a second image of justice, which concerns the equality of opportunity, freedom and power to co-determine the distribution of rights and goods (Wolthuis, Mak, and ten Haaf 2017). Alienation from the prevalent normative order, and thus from the distribution of rights and goods, engenders people´s resistance to moralized understandings of justice, of political obligation and of legitimacy, and when the values are questioned, the order is doubted. Ronald Dworkin, also argued that political obligation, a moral obligation, does not bind members of a group that is being excluded from the collective enterprise of governance, or those of political communities that violate their members' dignity (Delmas 2016). In these situations, the right to resist underscores the incompatibility between someone´s political circumstances, her alienation, and her moral convictions (D. D. Smith 1968)P715).

A system is just to the extent that it reconciles the authority of law with the independence of every person bound by it (Weinrib 2014)P719-722), not because the system adjudicates responsibilities in a manner consistent with positive laws. A system is just when its legal framework conforms with its own internal ideals, when it balances its morally acceptable purposes and aims with the power of the means that it employs to attain them. A system is just when dignity underpins the notion of justice. A just system affords people the opportunity to participate in the legislation of their own circumstances in a manner consistent with the principles of the ideology, and to arrive at a shared understanding of the conditions that support mutually beneficial social interaction. In a Rawlsian nearly just society[139], people recognize the reasonableness of treating each other in a just way, and to conduct themselves in a manner keeping with the guiding principles of democratic practice. In seeking a moral justification for acts of dissent, John Rawls argues that the disobedients appeal not to principles of personal morality or religion, let alone of self-interest, instead

[139] For some, Rawls' liberal theory of justice, like all liberal theories, is a universal theory because it supports moral individualism (Beck and Culp 2013)P41). Yet this is precisely where the conundrum with the Rawlsian theory lies, because injustice cannot be simply determined by the specific circumstances of the individual. Jacob Weinrib suggests that because the principle of justice is a regulative principle that calls for the ongoing approximation of a just legal system rather than a constitutive principle that calls for the realization of a perfectly just one, the duty to govern justly does not exceed the boundaries of possibility (Weinrib 2014)P723).

they invoke "the commonly shared conception of justice that underlies the political order" (Rawls 1999)P321)[140].

As the shared sense of justice is shattered, so is the understating of the notion (and the function) of the *ius resistendi* in society, because one is, in part, a reflection on the (lack) of the other. Nowhere is this more evident than in the manipulation of political actors of the idea of the right to resist, a right that individuals and groups have claimed for themselves when seeking to justify their own sense of justice, but not necessarily allow to others (Young 2011)P45). As a concept belonging to the order that it seeks to defy, the *ius resistendi* is pulled in conflicting directions forcing it, like the notions of law, dignity or justice, to adopt different interpretations of its own nature to justify its own ends.

Dignity, justice, and the right to resist, are similar in that they are all concepts that come into existence within the ideological. They form a three-sided relationship that demarcates the moral boundaries of the system. Affronts to the deepest sense of dignity and reactions to injustice, as long as they are rooted in reason, not just as a response "in desperation" from the pressing nature of the perceived wrong (Illan Rua Wall 2004)P5), find redress through the *ius resistendi.* All claims, to be recognized as rights, need to be translated in terms of dignity and justice, they need to be humanized. The legitimacy of an engagement of the right to resist, the test of its moral truth, is measured in terms of the capacity of the *ius resistendi* to translate claims into morally worth, universally recognized, or recognizable rights[141].

2.4. The functional roles: democracy.

Democracy is a system substantiated with the consent of most people that contribute, through their actions, to reproducing certain forms of social engagement and that accept the overall political system as valid and binding[142]. In a democratic regime, the public body

[140] In fact, for Rawls, a moral doctrine of justice general in scope is not distinguished from a strictly political conception of justice (Finlayson 2016)P4). Within the conception of their political value, for John Rawls, legitimate laws are those that can evince stability for the right reasons (Finlayson 2016)P7).

[141] The difference between a recognized and a recognizable right is important in terms of the functions of the right to resist. The *ius resistendi* can serve as an instrument-right to appeal to a recognized right in its function of defending the legal system, or to appeal to a recognizable right in its function of capturing a normative space, appealing to would-be rights that through social practice or believes are being recognized by the community but that have not yet acquired the status of a right.

[142] In 2004, the UN General Assembly adopted resolution A/RES/59/201. Paragraph 1 of the resolution states that, "the essential elements of democracy include respect for human rights and fundamental freedoms, *inter alia,* freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations,

manages conflict through institutions that are considered legitimate by those that submit to them, institutions that mediate among those that engage in the political to maintain social peace and to realize the functions that the ideological principles entrust to the state (for instance, the defence of fundamental rights or the protection of citizens).

Although the idea of democracy is one of the most widely shared aspirations among those taking the streets (Ishkanian and Glasius 2013), there still remains considerable scope for debate about the meaning of democracy as a political concept[143]. For those that support the procedural democratic theory, the existence of effective normative and procedural mechanisms to manage conflict is what provides democratic regimes with their legitimacy. For them, the basic democratic operation is the institutionalization of conflict (Augsberg 2011)P257). Others, like Dworkin, consider that democracy is a procedurally incomplete scheme of government and, therefore, that democratic political communities may combine a variety of solutions, procedural and substantive, to the articulation of the institutional structures involved in interpreting these democratic conditions (Loughlin and Tschorne 2017)P12). In a democratic regime, the political should be both the space where values[144] are translated into rights and freedoms and where rights and freedoms are exercised[145]. The procedural element of a democracy embodies the accepted channel through which values are materialized into a democratic ideal.

The Arendtian concept of "the political", Habermas's public sphere, the Rawlsian space for mutual recognition, or what others call the civic space (Buyse 2018), is where citizens constantly articulate, support or confront different views about the necessary conditions to realize democracy. The political exercise in itself recognizes and enables the equal participation of actors that contribute to the construction of the democratic ideal, regardless of the position of those actors in the institutional order. The political is the space where agents "through the exercise of rights, link individual interest, class position and their conception of the public good" (Douzinas 2019)P66) so that a vision of society and of its necessary conditions can be formulated.

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respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.

[143] In his Gettysburg address, Abraham Lincoln offered what is, perhaps, the most enduring notion of democracy, a government "of the people, by the people, for the people".

[144] As far as those values prevail over other values against which they compete in the public sphere.

[145] The 1949 Statute of the Council of Europe pledged the commitment of its Member States "to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". Article 3 notes that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" (CoE 1949). The 1950 European Convention on Human Rights refers to "political democracy" as the system best suited to maintain "fundamental freedoms which are the foundation of justice and peace in the world" (ECHR 1950).

In democratic systems, the *ius politicum* is the normative system that normalizes and legitimizes the democratic order that ensues from the negotiations in the political, is the space where rights are acknowledged and freedoms are performed, a space where "the struggle made in the language of political right to irritate and challenge the norms of constituted power" takes place (Loughlin 2014)P970). The *ius politicum* does not concern itself merely with framing the relations between the state and the people, but with providing the conditions to enable positive, constructive relations between the state and the people. Good democratic relations are based on informed consent, a situation where the state has clear obligations toward people, including with respect to people that disobey the law, and people are bound to obey their own laws.

Democracy is the only mode of lawgiving in which citizens are both rulers and ruled[146], sovereign and subject (Weinrib 2014)P721), where people are able to legislate their own conditions and are, at the same time, bound by their own law-making[147]. Democracy is an order where individuals can remain autonomous actors while consenting to their own rule. Consent to democratic rule, therefore, requires the legal system to be closely related to the social conditions that it seeks to justify. To count as law, to be part of the *acquis*, normative principles must be operationalized within the actual democratic regime (Loughlin 2016)(Shapiro 1964), that is, within the extant order, which implies that certain values are articulated through the political. The *ius politicum* is therefore not simply a legal space, it is a space where elements of ethics are mixed with power politics (Schmoeckel 2002)P3)[148].

A robust public law remains the central dynamic in legitimizing democratic rule (Tierney 2013)P2), but it can also become its biggest threat. As political notions about democratic conditions change, perhaps, although not always, reflecting variations in the ideology (understood as ontological frameworks), should law change too? If law is part of the political, shouldn't law be subject to modifications in the framework of changing principles? Brian Tamanaha argues that the challenge for modern legal systems is that societies change more swiftly than law, constantly generating a gap between them, and that the greater or lesser happiness of a people depends on the degree of promptitude with

[146] It is commonly accepted that democracy and rights go hand in hand and that one is the outcome of the fight for the other, and that both, democracy and rights, are achieved through struggle and resistance. Article 54 of the 2006 Statue of Autotomy of Catalonia, for instance, reads "1. The Generalitat (government) and other public authorities must ensure the knowledge and maintenance of the historical memory of Catalonia as a collective heritage that testifies to the resistance and the struggle for democratic rights and freedoms".

[147] Those that embrace democracy as their ideology, and thus as their moral system of values, should then have the autonomy, and the moral justification, to insist on basic rights, which give them important forms of protection and control over their own lives (Erman and Möller 2013)P9).

[148] Habermas maintains that the process of discussing and enacting law requires ethical discourses articulated on the background of a cultural identity (Spector 1995)P76).

which the gulf is narrowed (Tamanaha 2017)P19)[149]. In fact, the variation in the actualization of the political ideal of democracy is usually not immediately reflected in positive form (which constitutes the ultimate stage of normative development), but rather in the perceptions of what society considers law to be through its social practice, as well as in the role of law, and of those that apply and interpret it, in reproducing social norms that buttress the changing principles (not the values) of the order.

Democracies are systems constantly under pressure to make political and legal choices about how and when to assert rights (Ellian and Molier 2015)P11), their legitimacy being contingent, to a large extent, on the choice of which rights protect, how, and under which circumstances. The actualization of power in democracies pulls the *ius politicum*, and law, in two opposite directions, change or stability, forcing it to adopt different moral interpretations of its own nature to maintain its legitimacy. The legitimacy of the order (and the happiness of people) seems then to depend, to a great extent, on the role and on the effectiveness of the *ius politicum* in narrowing or widening the gap between the law and the moral value attached to the law, as well as in its success in establishing a convincing narrative to preserve its own nature. In that shifting reality, the *ius politicum* seeks to provide legitimate reasons to justify the changing conditions that arise from the actualization of power and the exercise of rights, while appealing to the unwavering values that form the democratic ideology and the very foundation of the system in which it rests.

For many, both freedom and equality are the distinctive moral values that have become the mantras of the liberal democratic system against which the normative value of legal and political institutions is assessed (Viehoff 2014)(Jubb and Rossi 2015). During the enlightenment, and later in democracies, "*egalité*" became one of the leading ideals of society. The revolutionary concept of equality qualified the relationship between the common citizen and other agents within the body politic, particularly those that had monopolized power thus far. Coupled with the-then new idea of the rights of man and of the citizen, equality would be later translated into the more tangible principle of non-discrimination and would become the foundation for other material and moral ideas about democracy. But while for some democracy is uniquely based on equality[150], others regard the principle of equality, in its political conception, not as an objective in itself, but as the premise for action (Douzinas 2013)P87). I agree with this latter approach. All human beings

[149] Following this reasoning, one can make a strong case to argue that disobedience should be allowed in democracies, since existing procedures may not offer real practical possibilities of changing the law when the majority is set in its attitude (Norman 1975)P608).

[150] Democracy is, according to Rancière, uniquely based on equality, which in its turn is rooted in the common fact of language: all speech presupposes a mutual understanding and a belonging to a shared community, and political action means to further this possibility and include thereby those that "have no part" in the common (Wallenstein 2013)P33).

are indeed born free and equal in dignity and rights, but equality can only be obtained when people are free, because those under submission can never be equal to those that keep them subjugated.

For critical theorists, freedom, not justice or equality, is the only candidate for the central value of democratically conceived political theory and practice (Celikates 2014b)P208)[151], because only citizens who can regard themselves as free are able to decide how to organize their lives together (Ellian and Rijkpema 2018)P102)[152]. To be free and to act free are the same (Berkowitz 2019)P5). Freedom acquires its sense and its meaning only in the public realm, because the political creates the necessary conditions for freedom to appear (Ellian and Molier 2015)P12, P231-238). Freedom is a public matter, a political category[153]. When freedom is exerted, rights get tested. Liberty, Foucault argued, is in itself political (Fornet-Betancourt 1987)P117) and so, to be free, is to be able to freely participate in the political, for decisions originate in freedom[154]. Freedom, hence, is not simply a negative absence of oppressive power, freedom is the power to act together with others to build a public space where one´s dignity, and that of others, underpins all that is legitimate and just. For Hannah Arendt too, the *raison d´être* of politics is freedom, and its field of experience is action (Arendt 1990)P274). Freedom is the factual opportunity to realize one´s liberties and to have the unconstrained ability to engage in the political. Specific rights, like freedom of speech, derive their normative value from freedom, not from the act of speech. The right to resist derives its legitimacy and value from freedom, not from the act of resisting. But just being free, or carelessly asserting one´s freedom, does not create the conditions for real freedom. It just collides with the freedom of others.

To engage in the public sphere and build a common space, freedom must be bonded with reason[155], since freedom without a purpose can turn into an irrational force capable of

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[151] Even for Rousseau "to renounce liberty is to renounce being a man, to surrender the rights of humanity and even its duties" (Rousseau 1762)Book1).

[152] Dworkin had the opposite view. He insisted that rights derive from a core right to equality that reflects the underlying political morality of liberal democracies. The right to equality means that the weaker members of a political community are entitled to the same concern and respect of the government as the more powerful members. Dworkin contends there is no right to liberty as such but only to those liberties, like freedom of speech, necessary to protect the right to be treated with equal concern and respect (Bellamy 2015)P3,9, 11). Dworkin´s equality, however, does not entail that weaker members are free, and by not being free, they cannot guarantee that they will be treated with the deserved and respect. Dworkin´s equality principle is imbalanced from conception, as it makes equality depend on one actor, the powerful.

[153] The real possibilities of human freedom, as Marcuse notes, are relative to the attained stage of civilization (Marcuse 1965)P105) and thus one must balance individual freedom with collective ethos.

[154] Foucault noted that personal or collective acts of liberation are not (always) sufficient to establish the practices of liberty (freedom) that the people need, and that "liberation is sometimes the political or historical condition for a practice of liberty" (Fornet-Betancourt 1987)P114).

[155] Article 1 of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights, but also that they are endowed with reason and conscience.

destroying freedom itself. The flipside of the unhindered individual right to freedom is an equivalent liberty to expand (a right to *lebensraum*) on the part of the state or the collective (Parfitt 2021). Without reason, the forces of the individual and the state become reckless, purely physical, nasty, brutish, and short. Carol Hay argues that a way in which oppression can harm people's capacity to act rationally and take decisions, is by harming their capacities for rational deliberation (Hay 2011)P25). Without the capacity of rational deliberation, in itself the essence of democracy, oppression remains unchallenged, for one is barred from acquiring the tools to recognize and claim her own rights, including the right to redress. Reason is what bequeaths the right to resist with its political (yet not its normative) significance.

2.4.1. *The principles of democratic practice.*

The central value of democracy is freedom, but freedom alone cannot justify the order. Freedom needs to be perfected through two interrelated principles that support what I call "democratic practice", that is, the performative occurrence of democracy in a manner consistent with its fundamental values. Principles of democratic practice rationalize, but do not constrain, the exercise of freedom.

The first principle of democratic practice is accountability, a principle that, for some, has replaced that of consent as the conceptual core of legitimacy (Chambers 2003)P308). The principle of accountability requires all actors to be responsible of their own freedom. In textbook democracies, the sovereign's capacity to decide is restricted by the political and, consequently, by the legal order, forcing power to appeal to the inherent values of society and to the principle of the common interest to justify its own nature and gain legitimacy. Contractualists, for instance, hold that the signatories of the social contract are answerable to each other for fulfilling their respective obligations under the terms of the contract[156]. That means that because man has the capacity to reason about his choices and decisions, because, in principle, he enters the contract in freedom, he stands under a continuing obligation to take responsibility for those decisions (Wolff 1970)P8). In the polis, man cannot do as he pleases because he is bound by the terms of the contract. That also means that the state does not hold unlimited power to do what it wants to its own people. Because the state is also a part of the contact, the state too is compelled by the principle of rationality and accountability in its choices.

[156] I use the term contract, in social contract, as "the claim that contract embodies a liberal tradition wherein the law serves to facilitate the free will of individuals as that will is expressed in promises" (Roberts 2004)P225). Although this is considered an "old" conception of contract because its operation has become increasingly dominated by judicial and legislative intrusion, it highlights the importance of the interrelation between freedom (of man) and promise (of power).

If citizens do not oblige, if citizens do not take responsibility for their own freedom, the state has powerful (political, legal, or social) tools to guarantee that they are, nevertheless, accountable for their actions. When we defy the rules, especially if we are unsuccessful in our claims, the very action of perceived political misbehaviour affects our normative status. As Judith Butler notes, if we are already politically constituted beings within that community, defiance turns us into social outcasts, and brings us to the margins of the rule-compliant society. We lose social status, which means that we also lose some political and legal protections and rights, eventually even that of freedom, as well as the recognition of our prior standing in society. If we are not recognized political beings in that society, then we are not free to act within the polis using its rules, forcing us to appeal to universal normative principles that are easily unheeded. We would not lose a social status or the legal or political protection we did not have, but we would be sentenced to remaining not only outcasts, but undesirables, or even ungrievable (J. Butler 2009).

Arguably, however, the foremost predicament of current liberal democracies is not disobedience by the subject, but rather, the public (as in the authority's) defiance of the principle of accountability. Current systemic and democratic deficits arise out of the necessity to preserve the principle of accountability as the basis of the order against the inherent resistance of powerbrokers to answer to society[157]. If the state does not oblige, if the state does not take responsibility for its choices, then there must be some autonomous

[157] Accountability can be bypassed in many ways, some are clearly illegal, like corruption, while others take advantage of legal system itself. The most obvious manner is, through juridification, a concerted action between political elites and the courts to delegate governing power to courts as a means of escaping political accountability. Juridification creates legal narratives to categorize political collective movements and spaces and re-interpret law to redefine (and accommodate) certain ex post outcomes which are negative for the interests of the powerful. Some refer to "legislative deferrals" pretty much in the same sense, meaning that legislative (political) actors might be interested in delegating governing power to courts as a means of escaping accountability (Rehder 2007)P10). For Sheldon Wolin, the U.S. is experiencing an inverted totalitarianism that exploits democratic practices in ways that defeat their original purpose, without dismantling or overly attacking them. If the original purpose of the democratic state is defeated. Wolin's inverted totalitarianism suggests that a few (whether in the public or the corporate world) with the power to not internalize the norms (while appearing to do so), have been able to evade their responsibilities without accountability (Wolin 2008). For Hannah Arendt, the most formidable form of dominion is bureaucracy, or the rule by an intricate system of bureaux in which no men can be held responsible, and which could be properly called the rule by Nobody. Indeed, if we identify tyranny as the government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even be asked to answer for what is being done. Bureaucracy is the form of government in which everybody is deprived of political freedom (Arendt 1969)P8-17).

way for citizens to demand accountability from the state[158], because devoid of alternative viable options to do so, even if heretical in nature[159], the notion of democracy is meaningless.

Some, consequently, accept that disobedience is a necessary means of challenging the structural deficits of the democratic state (Livingston 2019)P2). In this inference, disobedience emerges as an engagement that seeks to enforce accountability while preserving freedom within the political[160]. Herbert Marcuse argued that "the liberating force of democracy was the chance it gave to effective dissent, on the individual as well as on the social scale, its openness to qualitatively different forms of government, of culture, education, work-of the human existence in general" (Marcuse 1965)P95). Democracy acquires its full meaning when it becomes a system of possibilities within itself. The wonderful paradox of the democratic ideology, and what makes it politically viable, is indeed that we can agree that an action is wrong, for instance the use of object violence, while agreeing that tolerating it is right, for instance, the very principle of resistance to oppression (Tuckness 2002)P17). We can agree that even if a specific action or strategy is wrong, the *ius resistendi*, as the channel to demand accountably, is right for democracy[161], it is an integral part of the principles of democratic practice.

Many actually agree that tolerance for dissent is an element of a mature political culture (Habermas 1985)P99), and a crucial test case for any theory of the moral basis of democracy (Rawls 1991)P104). This overall agreement about the tolerability of dissent as means to hold power accountable, however, disappears as democracies confront direct forms of dissent and substitute politics by force. A political system, I contend, remains democratic not because it sanctions the decisions of the majority or compels a certain interpretation of the common good, but because it allows the continuous and concurrent demand for accountability form different actors, especially those that are not in the majority. What the

[158] I use the terms citizen aware that the "citizenship status conveys both the idea that someone is part of a specific political community, and the idea that someone is entitled to take part in the equal distribution of social goods occurring within this political community" (Raucea 2018). In other cases, I use the term "people" to describe anyone present in a territory or joining in an action, independent of their legal status.

[159] I use heresy in its original Greek meaning (*haíresis*) of choosing or not conforming to established rules.

[160] Although some argue that when there is no possibility for people to enforce the higher law against the ruler in the ordinary course of government, politics is lost (Rubin 2008)P154), I take the opposite view. The political is not created through the ordinary course of government (thought the institutionalized sequence of outcomes) but rather outside it, as the process through which people can find ways to enforce the higher law against the ruler, creating new, or challenging old, institutionalized sequences.

[161] The paradox of the democratic legal system is that it can create the conditions, especially through the action of the state, for the exception to not obey the law. There are cases in which we can obey the law and disobey it at the same time. In his Letter from Birmingham City Jail, Martin Luther King wrote: "There are some instances when a law is just on its face but unjust in its application" (King 1963). Whites often adopted laws that were de jure just but unjust in their application in order to maintain the legal fiction that blacks were treated equally (Tuckness 2002)P31). Civil rights activists, therefore, were not disobeying the law per se, but its unjust application and its unjust consequences.

right to resist questions are not the rules of the game, but the truthfulness of the rules that allow for the game to endure, for democracy can never be secure in itself (Howard 2007)P65).

The second principle of democratic practice is recognition, a principle that constricts the unbridled imposition of the will of the majority and prevents democracy from becoming the tyranny of the many[162]. In attempting to balance the principles of freedom and obligation, democracies have traditionally endeavoured to impose particular narratives aimed at homogenizing choices and avoiding deviance, while formally maintaining the dogma of the centrality of freedom as the pillar of the system. The principles of "majority rule" and "democratic consensus" are crafty. Some call them the politics of exclusion (Salazar Ugarte 2007)P261). They are philosophically based on the premise that those that have tacitly consented to their own rule have a moral right to have their principles reproduced, while avoiding addressing the question of what it means "to consent" or to which degree, and how, those principles are reproduced without becoming "imposed".

Democracies have certainly been compelled to acknowledge that the general will cannot be forced on the grounds of being legitimate because it represents the majority[163], for the very purpose of democracy would be defeated if a majority decision could violate minority rights (Pelloni 2000)P3)[164]. Even the drafters of the American constitution seemingly shared the view that democratic majorities can be the greatest danger to a free and functioning government (Elbasani 2009). Recognition as a principle of democratic practice refers to the mechanisms established to ensure that the majority principle is not blindly applied, but rather, that majority decisions are freely subsumed by the individual through a participatory process of mutual and beneficial acknowledgement as rational free agents.

Recognition *is* the political. The force engendered in the competition between recognition and dismissal, between being and not being, between belonging or being an outsider, shapes the political in a manner that reproduces the conditions to justify the imposition of one concept of power over the others. The power that prevails is the power socially

[162] Rosseau argued that "the general will acquires totalitarian tendencies because all those who refuse to obey the general will shall be forced to obey it by the entire body. The general will does not negotiate, debate, or reason. The general will forces" (Cliteur and Ellian 2019)P187).

[163] This principle has been established by the ECHR in its assertion that "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position". Case Young, James and Webster v. the United Kingdom (Application number 7601/76 and 7806/77) of 13 August 1981, para. 63.

[164] Or even personal rights. In Viehoff´s opinion, "in denying authoritative status to democratic decisions, I do not deny reason-giving status to the judgments of others that I grant my own judgment. It is then not the case that I treat myself with special regard when I deny the authority of a democratic decision (and instead act directly on what I judge to be the relevant reasons apart from the alleged authoritative directive), but show no such special regard for myself when I accept its authority" (Viehoff 2014)P345).

warranted to recognize others and to set the conditions for others to be recognized. Recognition is the act through which social roles are assigned and the value of the self, and of the collective, is determined. Recognition is the act of placing an agent in the "scale of worthiness" through which we assess the value of social and cultural objects, but also of political and moral beings. The act of recognition befalls as a reappraisal of the value of life itself, including of those whose existence, as Judith Butler argues, are not as grievable as the lives of others[165].

Axel Honneth identifies a form of recognition that focuses on moral and legal relations (established within the institutional contexts provided by the law and the state), that make it possible for individuals to achieve recognition as persons with dignity, as free and equal subjects on a par with others, and as beings with a moral and legal status whose claims count, and cannot simply be ignored or dismissed (Dearnty 2011)P60). Many readings of the principle of recognition imply that there is a "recognizing actor" (the sovereign, the state, the church, or the market), with the power to acknowledge, accept or dismiss the claims and the very existence of others (the individual, or a community). This form of recognition is primarily threatened by disrespect and by misrecognition in the form of a denial of rights, and of exclusion from the legal community (Celikates 2021)P261). This is, however, not a form of recognition but of mere admission of the existence of another agency.

My concept of recognition refers not to the declaration of power of one agent over the other, but to a process of reciprocal recognition of agency as the basis of legitimate, participatory and normative-creating political spaces. My concept of recognition implies that the recognizing agent is subject to recognition by the recognized agent, and vice-versa. Recognition does not imply sameness or evenness in terms of rights and duties, in terms of power or in terms of moral standing. It rather refers to the mutual assent of extant agency within the political, and with it, the possibility of having and asserting power. Recognition is an exercise of sovereignty, a struggle for power within the political, a contest that defines and determines the value of each agent within the "scale of worthiness". An agent that has no value is not recognized, and conversely, an agent that is not recognized has no value. An agent that defies or disregards recognition may have value, but only inasmuch it values the recognizing agent.

In liberal democracies, the fundamental (and ideologically binding) principle of equal political participation and thus, the mere anticipation of "having to recognize" others as political actors, challenges the possibility of exclusivity in the interpretation of the order or

[165] Without grievability, there is no life, or, rather, there is something living that is other than life (J. Butler 2009)P15).

the unilateral decision over the existence of others[166]. The ineluctability of recognition emerges at the moment when an individual (or a collective), asserts her presence, her existence, or her persistence to exist. It is at that point that the collective, or the person, ceases to be valueless (ignored, or ungrievable) to acquire value as an agent whose existence disturbs (not necessarily changes) the causality of relations in the political. As Badiou notes, "as the inexistent comes to exist, the arrangement of power and possibility, at least temporarily, is altered" (M. S. Richards 2014)P108).

To resist is to assert agency, and agency is constantly actualized in the struggles for and over recognition, struggles that often get started when the oppressed can credibly threaten violent unrest (Celikates 2021)P277). Brownlee contends that when disobedients and authorities target each other, their confrontation allows for a direct comparison of the respective justifiability of their conduct (Brownlee 2006)P1)[167]. Engaging in the political, recognizing the other as a political agent, suggests that one assumes obligatory ties to the other (Rawls 1991)P113), but mutual recognition does not imply acquiescence. It does not infer that the state, for instance, is under an obligation to fully consent to the claims of the disobedient, or that it should give the inexistent an equal voice in all matters, or that resisters are entitled to an equal say (Edyvane 2020)P95). It does not imply, either, that the disobedient must recognize the state as a legitimate interlocutor, or that she cannot engage in apostasy, or reject the market by creating cooperative structures.

In liberal democracies, the state recognizes prioritized subjects as "rights bearers" (the citizens, the consumers, the proprietors), as a way to indicate the order of precedence of moral values, and of people, according to their contribution to supporting the status quo. In most cases, the degree to which one is recognized is foremostly a matter of prior existence, an acknowledgement that favours those that are already constituted as political agents (Walzer 2017)[168]. The value claimed through an external engagement of the right to

[166] For some, and I agree, to resist becomes an expression of societies' "despair over the impossibility of joining together (with the tyrant) to act at all" (Kohn 2001).

[167] Contrary to Brownlee, that argues that to be serious in her aim to bring about a lasting change in law or policy, she must recognize the importance of engaging policymakers in a moral dialogue (Brownlee 2006)P3), I argue that the engagement must go beyond the moral and that it should be framed within the legal (not necessarily the legality, as Brownlee tends to imply) and the political (in its different expressions). In other words, to talk to power, one must show power (in whatever moral, physical, legal, or other forms).

[168] Article 11 of the Treaty on the European Union establishes that 1) The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. In particular, article 4 notes that 4) Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. (Official Journal of the European Union C 326/13 of 26.10.2012). The EU treaty recognizes that social

resist by a full, property owning, tax paying citizen may be recognized afore those asserted by an illegal immigrant. When resistance is as an act of an already constituted political community, it forces the state to reassess, at least, the value of the asserted moral claim. It does not mean that the "full citizen" has immunity from potentially being punished because of her belonging to a constituted political community, rather, it reopens the competition that influences the form of the political, and it compels a revision of the justificatory reasons used by the state to impose one notion of power over the other.

Engaging with the state enables those that assert their right to resist to enjoy a certain standing in relation to the question of recognition, even though that standing is defined by circumstances other than the acknowledgement a particular claim or a right to a claim. Those that challenge the *status quo* are usually not recognized as bearing a right (to resist), but they are recognized as holding duties (for instance, not to interfere with traffic, to abide by the rules, or not to challenge the system). I argue that it is precisely in the recognition of duties that the resisting agent asserts her sovereignty and establishes her value, for it is in the obligations they create, not in the privileges that they bestow, that rights acquire their meaning. Law finds its efficacy in its compliance, not in the mere fact of being enacted. The *ius resistendi* is the right to recognition, or more precisely, it imposes a duty of recognition. The *ius resistendi* does not belong to the person by virtue of her nature as a human, but because of her ability to assert and exercise political agency, regardless of her prior status as a recognized political agent, and with that agency, create rights and obligations for herself and for third parties.

If we are inexistent, defying the rules of a system we do not belong to, turns us into political agents. We then have the ability of engage with that system and generate political power, which is the basis for recognition. Asserting the *ius resistendi* allows previously marginalized individuals or collectivities to be recognized as agents through their public engagements, and to create new forms of political subjectivity to contest and put into question claims to recognition that affect them (Celikates 2021)P277). The *ius resistendi* grants the disobedient, even the inexistent or the ungrievable, political and legal protection and recognition, because, paradoxically "only as an offender against the law can he gain protection from it" (Arendt 1973)P286).

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movements are legitimate to bring about change in the EU, yet only by providing initiatives for new legislation. It does not endorse an initiative to repel or resist extant directives or regulations. In many countries, the "popular" or "citizen´s initiative" is available, including, in some countries, the power to ask for direct referendums on key questions, though most countries prohibit direct initiatives on tax or budget issues, international treaties or key constitutional issues. Because of these restrictions and the needed percentage of registered voters required for the popular initiative to be brought to the respective parliament, popular legislative initiatives are rarely successful, especially those that deal with issues of fundamental importance for society.

Recognition is necessary to exist in the political. Hannah Arendt suggests that there should be a human right to belong to a political community for all human beings as a precondition for the protection of other human rights (Faghfouri Azar 2019). But recognition is also a necessity in physical terms, because lacking recognition as a rights-bearing agent, as a grievable-worthy subject, the person is prevented from fully realizing life itself. The process of recognition befalls through the very ideological framework that gives content to the *ius politicum*, the democratic ideology, and to the whole structure of the kind artifacts that we create to maintain it, the notion of rights. In a system where democracy is advanced through the principles of accountability and recognition, the effectiveness of the *ius resistendi* as a rights-claiming exercise is measured against the sturdiness of the *ius politicum* to assent, reject or adapt to those demands, and therefore, in its capacity of reproducing forms of oppression, or of instituting forms of freedom, or in determining the value of rights, and the value of the lives of others. The competing relationship between democracy and dissent, between those that are recognized as bearing rights and those that are not, opens spaces for the un-recognized, and the un-grievable, to compete for recognition[169], for political (and sometimes even physical) life.

In conclusion, there is no clarity on what a nearly just society should look like today. There is not even a consensus on whether the ideological basis of our societies remains the ideal of democracy[170]. All major aspects of legality have been weakened. Rule is replaced by regulation, normativity by normalization, legislation by executive action, principle by discretion and legal personality by administratively assigned roles and competencies (Douzinas 2013)P44). In this context, law continues to be a paradox because we continue to be uncertain whether its nature corresponds to the values of an ideology that we are unsure how to define. And indeed, the term we use to refer to the *grundnorm* has immense implications, for our inherent sense of obligation to obey the law, our faith in the values that define us as moral agents, and our believe in that we are being recognized as active members of that society depend wholly on it.

[169] I use the term un-recognized in a flexible manner. A citizen may have some specific right or freedom un-recognized while remaining a citizen, for instance, an unheard claim against discrimination based on gender. People can also be un-recognized in their whole (e.g., illegal immigrants), with all her rights unacknowledged.
[170] Many consider we currently live in a neoliberalist, rather than in a democratic ideology. As an ideology, neoliberalism sees the market as a supreme good in itself, just as most of its accompanying rhetoric concerning 'freedom' ultimately concerns the freedom to buy and sell and to acquire and maintain property (Garland 2012)P5). Others believe that recent transformations call into question, even unseat, assumptions of liberal democracy because legislation passed after 9/11 in many countries represent real threats to, and in some cases the removal of, fundamental pillars such as due process, presumption of innocence, right to disclosure of evidence, open hearings, timely processing, even habeas corpus (Jeff Shantz 2014)P17).